AHMAD AZHAR OTHMAN v. ROZANA MISBUN

HIGH COURT MALAYA, SHAH ALAM
WONG KIAN KHEONG J
[CIVIL APPEAL NO: BA-12B-158-10-2018]
10 APRIL 2020

TORT: *Assault and battery – Domestic abuse – Husband physically assaulted and battered wife – Husband charged for voluntarily causing grievous hurt under s. 325 of Penal Code – Charged compounded under s. 260 of Criminal Procedure Code ('CPC') – Whether wife could initiate civil proceedings to claim for damages premised on tort of battery – Whether s. 260 of CPC bars wife from instituting civil suit for damages for tort of battery – Whether s. 260 of CPC could be modified pursuant to art. 162(6) of Federal Constitution ('FC') – Whether necessary to bring s. 260 of CPC into accord with art. 5(1) of FC – Whether claim for damages ought to be allowed*

CONSTITUTIONAL LAW: *Fundamental rights – Right of access to justice – Claim premised on tort of battery – Domestic abuse – Husband physically assaulted and battered wife – Claim for damages – Husband charged for voluntarily causing grievous hurt under s. 325 of Penal Code – Charge compounded under s. 260 of Criminal Procedure Code ('CPC') – Whether wife could claim for damages premised on tort of battery – Whether s. 260 of CPC bars wife from instituting civil suit for damages for tort of battery committed by husband – Whether s. 260 of CPC could be modified pursuant to art. 162(6) of Federal Constitution ('FC') – Whether necessary to bring s. 260 of CPC into accord with art. 5(1) of FC – Right of access to justice by institution of suit for damages*

CIVIL PROCEDURE: *Jurisdiction – Courts – Jurisdiction of court to hear claim for damages premised on tort of battery – Whether Syariah Court seized with jurisdiction to hear claim – Whether Sessions Court had jurisdiction to hear and decide claim – Subordinate Courts Act 1948, s. 3(2)(a) – Married Women Act 1957, s. 4A – Domestic Violence Act 1994, s. 10*

CIVIL PROCEDURE: *Jurisdiction – Courts – Jurisdiction of court to hear claim premised on breach of trust – Whether Sessions Courts seized with jurisdiction to try claim for breach of trust – Courts of Judicature Act 1964, s. 23(1) – Subordinate Courts Act 1948, ss. 65(1) & 69(e)*

DAMAGES: *Claim – Claim premised on tort of battery – Husband physically assaulted and battered wife – Whether award of damages by Sessions Court excessive – Whether warranted appellate intervention*

The respondent ('plaintiff') claimed that her then husband, the appellant ('defendant') (i) after accusing the plaintiff of stealing the defendant's money, had physically assaulted the plaintiff at their matrimonial home ('first battery'); (ii) took the plaintiff (a) to the bank where she was forced to

withdraw all her money in the sum of about RM29,000 which was then taken by the plaintiff; and (b) the office of Permodalan Nasional Bhd ('PNB') where she could withdraw all her money from her Amanah Saham Bumiputera account ('ASB account'); (iii) was incensed when he was informed by PNB that the plaintiff only had RM230 in her ASB account. The defendant scolded and hit the plaintiff on her face and chest at the PNB's reception counter ('second battery'); (iv) after leaving the PNB office, the defendant hit the plaintiff again at the car park ('third battery'); and (v) took the plaintiff to a law firm and forced the plaintiff to sign some documents. In response to the plaintiff's allegations, the defendant averred that (i) the defendant had entrusted a sum of RM500,000 ('alleged sum') to the plaintiff for the latter to keep for the family's future and for their children's education; and (ii) the plaintiff had breached the trust by spending the alleged sum on branded clothes, bags and shoes for her own personal use. The defendant was charged at the Magistrate's Court (i) regarding the first battery, for voluntarily causing grievous hurt to the plaintiff, an offence under s. 325 of the Penal Code. The charge was compounded under s. 260 of the Criminal Procedure Code ('CPC') with the plaintiff's consent when the plaintiff received a sum of RM10,000 from the defendant; and (ii) regarding the second battery, for voluntarily causing hurt to the plaintiff under s. 323 of the PC, to which the defendant pleaded guilty and was fined RM2,000. The plaintiff then commenced a civil claim for damages ('original claim') against the defendant, premised on the tort of battery, at the Sessions Court claiming for (i) special damages in the amount of RM122,000; (ii) general damages in the amount of RM250,000; and (iii) aggravated and exemplary damages totalling to RM300,000. The defendant counterclaimed against the plaintiff for, among others, (i) the return of the alleged sum; (ii) aggravated damages in the amount of RM100,000. The Sessions Court Judge ('SCJ') allowed the plaintiff's claim and dismissed the defendant's counterclaim. The defendant was ordered to pay RM30,000 and RM50,000 as general and aggravated damages, respectively. Hence, the present appeal by the defendant against the SCJ's decision in allowing the original action and dismissing the counterclaim. The issues that arose for adjudication were (i) whether s. 260 of the CPC, which provides that the compounding of an offence committed by a person ('X') against another person ('Y'), (a) bars Y from a civil suit for damages for a tort of battery committed by X against Y; or (b) does not prevent Y from suing X for the tort of battery because s. 260 of the CPC should be modified pursuant to art. 162(6) of the Federal Constitution ('FC') as may be necessary to bring s. 260 of the CPC into accord with art. 5(1) of the FC, which provides for Y's fundamental right of access to justice by the institution of Y's suit against X; (ii) whether the civil or Syariah Courts have jurisdiction to decide claims regarding tort of battery and breach of trust; (iii) whether the Sessions Courts or High Court have the jurisdiction to try

a claim for breach of trust under s. 23(1) of the Courts of Judicature Act 1964 ('CJA') and ss. 65(1) and 69(e) of the Subordinate Courts Act 1948 ('SCA'); (iv) whether the plaintiff could tender as evidence under s. 90A(1) and (2) of the Evidence Act 1950 ('EA') a copy of the closed circuit television ('CCTV') recording of the second battery; (v) whether the SCJ made a plain error of fact in allowing the original action; (vi) whether there was any ground for appellate intervention regarding the Sessions Court's award of general and aggravated damages.

Held (dismissing appeal):

(1) There is nothing in s. 260 of the CPC, either expressly or by necessary implication, which bars the plaintiff from filing the original action against the defendant. The CPC, including s. 260, only applies to criminal matters and not to civil cases. If it is assumed that s. 260 of the CPC excludes the court's jurisdiction to try the original action, this means that the plaintiff had been deprived of her fundamental right of access of justice as enshrined in art. 5(1) of the FC. The court has the power, under art. 162(6) and (7) of the FC to 'modify' any 'existing law', such as the CPC, as is necessary to bring the existing law into accord with the FC. By virtue of art. 162(6) and (7) of the FC, there was no hesitation to modify s. 260 of the CPC so as to bring s. 260 of the CPC into accord with art. 5(1) of the FC, namely s. 260 could not deprive the plaintiff's fundamental access to justice by way of the original action. The compounding of charge solely concerned the first battery while the original action was based on the three batteries. It was clear that the defendant could not rely on the compounding of charge to deny his liability for the second and third batteries. (paras 17-19, 22, 23 & 25)

(2) The Sessions Court, and not the Syariah Court, has the jurisdiction to hear the original action. The Sessions Court is established under s. 3(2)(a) of the SCA. It was clear that the Sessions Court had the jurisdiction to decide the original action based on a tort of battery under s. 65(1)(b) of the SCA because the original action fell within the phrase 'all other actions and suits of a civil nature where the amount in dispute or the value of the subject matter does not exceed one million ringgit' in s. 65(1)(b) of the SCA. In addition to s. 65(1)(b) of the SCA, the following provisions also empower the Sessions Court to hear the original action based on a tort of battery: (i) section 4A of the Married Women Act 1957; and (ii) section 10 of the Domestic Violence Act 1994 ('DVA'). (paras 29-31)

(3) The counterclaim concerned allegations of breach of trust. The jurisdiction of the Sessions Court's under s. 65(1) of the SCA is subject to s. 69 of the same. Section 69(e) of the SCA expressly states that the Sessions Court 'shall have no jurisdiction' to try any action to enforce

any trust. Consequently, the Sessions Court had no jurisdiction to hear the counterclaim. Therefore, the part of the Sessions Court's decision, in dismissing the counterclaim, was set aside and substituted with an order that the counterclaim be struck out with no order as to costs. (paras 32 & 34)

(4) The investigating officer ('IO') had made a copy of PNB's CCTV recording of the second battery in exh. P24. The IO then produced a certificate under s. 90A(2) of the EA which certified that exh. P24 had been produced by a computer in the IO's officer in the course of the ordinary use of the police computer. The SCJ did not err in admitting exh. P24 as evidence in this case. The IO's certificate complied with s. 90A(2) of the EA. (paras 35 & 38)

(5) A plaintiff alleging battery by a defendant has to prove that: (i) the defendant has committed an act which directly causes physical contact with the plaintiff; (ii) the act was done without the plaintiff's consent; and (iii) the act was done intentionally or negligently by the defendant. The three elements regarding the three batteries have been proven by the plaintiff in the original action. The evidence and reasons relied on were (i) the expert opinion of the medical doctor who examined and treated the plaintiff; (ii) three radiology reports regarding x-ray examinations of the plaintiff which showed fractures of the plaintiff's ribs as a result of the three batteries; (iii) photographs regarding the plaintiff's injuries; (iv) the plaintiff was admitted into a medical centre for two days; and (v) the plaintiff's police reports against the defendant regarding the three batteries. The SCJ had not made a 'plain error of fact' regarding the defendant's liability to the plaintiff in respect of the three batteries. (paras 40-42)

(6) The Sessions Court award of RM30,000 as general damages for the plaintiff's injuries was affirmed as the award was (i) 'just and reasonable' in accordance with s. 10(1) of the DVA, in view of the nature and extent of the plaintiff's injuries; and (ii) not 'so extremely high' to warrant appellate intervention. The Sessions Court further awarded RM50,000 as aggravated damages to be paid by the defendant to the plaintiff. There should not be any appellate intervention regarding the award on aggravated damages because the defendant's conduct had clearly justified such an award. (paras 45 & 47)

Case(s) referred to:

Assa Singh v. Menteri Besar, Johore [1968] 1 LNS 9 FC ***(refd)***

B Surinder Singh Kanda v. The Government of the Federation of Malaya [1962] 1 LNS 14 PC ***(refd)***

Daning Laja v. KK Hj Tuaran Majid [1993] 1 CLJ 44 HC ***(refd)***

Gan Yook Chin & Anor v. Lee Ing Chin & Ors [2004] 4 CLJ 309 FC ***(refd)***

Imperator v. Mulo (1913) 14 Cri 292 ***(refd)***

PP v. Azilah Hadri & Anor [2015] 1 CLJ 579 FC ***(refd)***
Sambaga Valli K R Ponnusamy v. Datuk Bandar Kuala Lumpur & Ors And Another Appeal [2017] 1 LNS 500 CA ***(refd)***
Sayamma Dattatraya Narsingrao v. Punamchand Raichand Marwadi AIR 1933 Bombay 413 ***(refd)***
Sivarasa Rasiah v. Badan Peguam Malaysia & Anor [2010] 3 CLJ 507 FC ***(refd)***
Topaiwah v. Salleh [1968] 1 LNS 161 FC ***(refd)***
Wong Swee Chin v. PP [1980] 1 LNS 138 FC ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, s. 23(1)(a), (b), (c)
Criminal Procedure Code, ss. 3, 5, 260
Domestic Violence Act 1994, ss. 2(b), 10(1), (2)(a)
Evidence Act 1950, ss. 3, 45(1), 62, 90A(1), (2), (3)(b), (4)
Federal Constitution, arts. 5(1), 160(2), 162(6), (7)
Married Women Act 1957, s. 4A
Penal Code, ss. 323, 325, 326A
Subordinate Courts Act 1948, ss. 3(2)(a), 65(1)(b), 69(e)

The Code of Criminal Procedure 1898 [Ind], s. 345
The Code of Criminal Procedure 1973 [Ind], s. 320
The Constitution of India [Ind], art. 21

For the appellant - Hazman Harun; M/s Hazman Tan
For the respondent - Ahmad Fakhri Abu Samah, Azlan Abdul Roni & Nasyrah Ezzan Ali; M/s Roni & Co

Reported by Najib Tamby

JUDGMENT

Wong Kian Kheong J:

Introduction

[1] This appeal concerns allegations of wife battering by a famous singer and actor known as "Awie".

[2] A novel question of constitutional importance (constitutional question) arises in this case - whether s. 260 of the Criminal Procedure Code (CPC) (which provides that the compounding of an offence committed by a person (X) against another person (Y)):

(i) bars Y from filing a civil suit for damages for a tort of battery committed by X against Y; or

(ii) does not prevent Y from suing X for the tort of battery because s. 260 CPC should be modified pursuant to art. 162(6) of the Federal Constitution (FC) as may be necessary to bring s. 260 CPC into accord with art. 5(1) FC (which provides for Y's fundamental right of access to justice by the institution of Y's suit against X).

[3] I will refer to parties as they are before the Sessions Court (SC).

[4] The plaintiff (plaintiff) is the wife of the defendant (defendant).

Plaintiff's Case

[5] The plaintiff claimed as follows, among others:

(i) on 2 June 2014, in the matrimonial home of the plaintiff and defendant at No. 9, Jalan UB5B, Taman Ukay Bistari, Ukay Perdana, 68000 Ampang (home), the defendant had accused the plaintiff of, among others, stealing the defendant's money;

(ii) the defendant physically assaulted the plaintiff at home (first defendant battery) as follows:

(a) the defendant punched repeatedly the plaintiff on her nose and this had caused the plaintiff to fall to the floor;

(b) while the plaintiff was lying down on the floor, the defendant kicked and stomped on the left side of the plaintiff's chest; and

(c) the defendant had used a monopod to hit the plaintiff until the monopod broke into three pieces;

(iii) the first battery took place in the presence of:

(a) the three children of the plaintiff and defendant (children);

(b) a maid who worked at home for the plaintiff and defendant (maid); and

(c) the defendant's personal chauffeur (chauffeur);

(iv) the defendant then forcibly took the plaintiff to the Alliance Bank's branch at Ampang (Alliance Bank) where the defendant forced the plaintiff to withdraw all the money in the plaintiff's bank account with Alliance Bank in a sum of about RM29,000 (sum). The sum was taken by the plaintiff;

(v) after going to Alliance Bank, the defendant forced the plaintiff to go to the office of Permodalan Nasional Berhad (PNB) at Jalan Tun Razak, Kuala Lumpur, so that the plaintiff could withdraw all the money in the plaintiff's "Amanah Saham Bumiputera" account (ASB account). The defendant was incensed when he was informed by PNB that the plaintiff only had RM230 in the ASB account. Hence, the defendant scolded and hit the plaintiff on her face and chest at the PNB's reception counter (second battery);

(vi) after the plaintiff and defendant left PNB and were at a car park, the defendant hit the plaintiff again (third battery);

(vii) the defendant took the plaintiff to a law firm in Pandan Indah and forced the plaintiff to sign some documents prepared by the defendant's solicitor, Encik Azwan; and

(viii) the plaintiff sought medical treatment and made police reports against the defendant.

Defendant's Case

[6] The defendant alleged as follows, among others:

(i) as a successful singer and actor, the defendant had entrusted a sum of RM500,000 (alleged sum) to the plaintiff for the latter to keep the alleged sum for:

(a) the future of the plaintiff, defendant and children; and

(b) the children's education;

(ii) the plaintiff is a homemaker with no source of income;

(iii) the plaintiff had spent the entire alleged sum on branded clothes, bags and shoes for her own personal use. As such, the plaintiff had breached the trust regarding the alleged sum (alleged breach of trust); and

(iv) the defendant had lodged a police report against the plaintiff regarding the alleged breach of trust.

Criminal Proceedings

[7] On 7 March 2016 the defendant was charged in the Ampang Magistrate's Court (charge (Ampang Court)) with an offence of voluntarily causing grievous hurt to the plaintiff under s. 325 of the Penal Code (PC). The charge (Ampang Court) concerned the first battery and was compounded under s. 260 CPC with the plaintiff's consent (compounding of charge (Ampang Court)) when the plaintiff received a sum of RM10,000 from the defendant.

[8] Regarding the second battery, the defendant was charged in the Kuala Lumpur Magistrate's Court for voluntarily causing hurt to the plaintiff under s. 323 PC which is punishable under s. 326A PC (charge (KL Court)). The defendant pleaded guilty to the charge (KL Court) and was fined RM2,000.

Proceedings In SC

[9] The plaintiff filed this suit in SC against the defendant (original action) based on the first to third battery (three batteries) and claimed for the following remedies, among others:

(i) special damages in a sum of RM122,000;

(ii) general damages amounting to RM250,000; and

(iii) aggravated damages and exemplary damages totalling RM300,000;

[10] In the original action, the defendant had counterclaimed against the plaintiff (counterclaim) for the following relief, among others:

(i) the plaintiff shall return the alleged sum to the defendant; and

(ii) aggravated damages of an amount of RM100,000.

[11] The original action and counterclaim were tried together before the learned Sessions Court Judge (SCJ). After a trial, the SC decided as follows, among others (SC's decision):

(i) the original action was allowed with the following orders, among others:

(a) the defendant shall pay RM30,000 as general damages to the plaintiff;

(b) aggravated damages in a sum of RM50,000 shall be paid by the defendant to the plaintiff;

(c) the defendant shall pay to the plaintiff interest at the rate of 5% per annum on the total sum of damages, RM80,000 (total damages), from the date of the filing of the original action until full payment of the total damages; and

(d) costs of the original action amounting to RM10,000 shall be paid by the defendant to the plaintiff; and

(ii) the counterclaim was dismissed with no order as to costs.

[12] The defendant has appealed to this court against SC's decision in respect of the original action (regarding both liability and quantum) and the dismissal of the counterclaim.

Issues

[13] Apart from the constitutional question, the following issues arise in this appeal:

(i) whether civil courts or Syariah courts have jurisdiction to decide claims regarding tort of battery and breach of trust. This concerns an interpretation of s. 65(1)(b) of the Subordinate Courts Act 1948 (SCA), s. 4A of the Married Women Act 1957 (MWA) and s. 10 of the Domestic Violence Act 1994 (DVA);

(ii) does SC or High Court (HC) have jurisdiction to try a claim for breach of trust under s. 23(1) of the Courts of Judicature Act 1964 (CJA), ss. 65(1) and 69(e) SCA?;

(iii) whether the plaintiff could tender as evidence under s. 90A(1) and (2) of the Evidence Act 1950 (EA) a copy of "CCTV" (closed-circuit television) recording (exh. P24) at PNB's office (which showed the second battery) obtained by Sergeant Norsiah binti Muin (IO) during her investigation concerning the second battery;

(iv) did the learned SCJ make a "plain error of fact" in allowing the original action regarding the three batteries?; and

(v) is there any ground for appellate intervention regarding SC's award of general damages and aggravated damages in the original action (damages award)?

Does Section 260 CPC Bar Original Action?

[14] The defendant's learned counsel has invited this court to find that the compounding of charge (Ampang Court) under s. 260 CPC bars the plaintiff from filing the original action based on a tort of battery. According to the defendant's learned counsel, our s. 260 CPC is similar to s. 320 of the Indian Criminal Procedure Code 1973 [ICPC (1973)]. The defendant's learned counsel has relied on the following two Indian judgments (two Indian cases):

(i) in *Imperator v. Mulo* (1913) 14 Cri 292, at 293, Pratt JC decided as follows in Sind Judicial Commissioner's Court:

> *The provisions of section 340(5) indicate that the composition has the same effect in a criminal trial as it would in a civil suit. It operates as complete a bar to the prosecution as if the accused had been acquitted.*
>
> (emphasis added); and

(ii) Baker J held as follows in a two-member coram decision of the Bombay HC (concurred by Shingne J) in *Sayamma Dattatraya Narsingrao v. Punamchand Raichand Marwadi* AIR 1933 Bombay 413, at 414:

> *The law allows the compounding of the offence under Section 420, and we need not consider that aspect of the case. The effect of the compounding, apart from the acquittal of the accused, would be that a suit for damages on the facts constituting the original offence would not lie: Sheikh Basiruddin v. Sheikh Khairat Ali* (1913) 17 CWN 948.
>
> (emphasis added).

[15] Firstly, the two Indian cases were decided based on the previous s. 345 of the Indian Criminal Procedure Code 1898 [ICPC (1898)]. Section 345 ICPC (1898) has now been replaced in India with s. 320 ICPC (1973).

[16] Our s. 260 CPC is based on s. 345 ICPC (1898). I reproduce below s. 260 CPC:

> Compounding offences.
>
> *260(1) The offences punishable under the Penal Code described in the first two columns of Part A may, when no prosecution for such offence is actually pending, be compounded by the person mentioned in the third column of Part A; or when a prosecution for such offence is actually pending, be compounded by the person with the consent of the Court before which the case is pending.*

A *(2) The offences punishable under the Penal Code described in Part B may, with the consent of the Court before which the case is pending, be compounded by the person to whom the hurt has been caused.*

(3) When any offence is compoundable under this section the abetment of the offence or an attempt to commit the offence (when the attempt is itself an offence) may be
B *compounded in like manner.*

(4) When the person who would otherwise be competent to compound an offence under this section is not competent to contract any person competent to contract on his behalf may compound the offence.

(5) The composition of an offence under this section shall have the effect of an
C *acquittal of the accused.*

(6) No offence under the Penal Code not mentioned in this section shall be compounded.

(emphasis added)

D **[17]** Firstly, I am of the view that there is nothing in s. 260 CPC, either expressly or by necessary implication, which bars the plaintiff from filing the original action against the defendant. In the Federal Court case of *Metramac Corporation Sdn Bhd v. Fawziah Holdings Sdn Bhd* [2006] 3 CLJ 177 at [17]; [2006] 4 MLJ 113, at [32], Augustine Paul FCJ has decided as follows:

E [17] *As both the issues relate to the construction of a statutory provision dealing with the jurisdiction of courts, it is appropriate to consider them against the background of rules of interpretation peculiar to them. Reference must first be made to the statement of Tindal CJ in Albon v. Pyke* (1842) 4 M & G 421 *when he said, in dealing with the jurisdiction of superior courts*, at p. 424:

F *The general rule undoubtedly is that the jurisdiction of superior courts is not taken away except by express words or necessary implication.*

(emphasis added)

[18] Secondly, CPC (including s. 260 CPC) only applies to criminal matters and not to civil cases. This is clear from the long title to CPC,
G ss. 3 and 5 CPC which provide as follows:

Long Title

An Act relating to criminal procedure.

Trial of offences under Penal Code and other laws.

H *3. All offences under the Penal Code shall be inquired into and tried according to the provisions hereinafter contained, and all offences under any other law shall be inquired into and tried according to the same provisions: subject however to any written law for the time being in force regulating the manner or place of inquiring into or trying such offences.*

I

Laws of England, when applicable.

5. As regards matters of criminal procedure for which no special provision has been made by this Code or by any other law for the time being in force the law relating to criminal procedure for the time being in force in England shall be applied so far as the same shall not conflict or be inconsistent with this Code and can be made auxiliary thereto.

(emphasis added)

[19] Thirdly, if it is assumed that s. 260 CPC excludes the court's jurisdiction to try the original action, this means that the plaintiff has been deprived of her fundamental right of access to justice (fundamental access to justice) as enshrined in art. 5(1) FC. In the Federal Court case of *Sivarasa Rasiah v. Badan Peguam Malaysia* [2010] 3 CLJ 507, at [4], Gopal Sri Ram FCJ has explained fundamental access to justice as follows:

[4] **Article 5(1)** may be selected to illustrate the point that is sought to be made since it is one of the provisions relied on in this case. **That article proscribes the deprivation of life or personal liberty, save in accordance with law**. "Law" wherever mentioned in Part II of the Constitution includes - by statutory direction - the common law of England (see art. 160(2) read with s. 66 of the Consolidated Interpretation Acts of 1948 & 1967). **It is now well settled that by the common law of England the right of access to justice is a basic or a constitutional right. See, *Raymond v. Honey*** [1983] 1 AC 1, 13; *R v. Secretary of State for the Home Department, ex parte Leech* [1993] All ER 539. *In Thai Trading Co (a firm) v. Taylor* [1998] 3 All ER 65 at 69, *Millett LJ described it as a fundamental human right. Thus, the common law right of access to justice is part of the "law" to which art. 5(1) refers. In other words, a law that seeks to deprive life or personal liberty (both concepts being understood in their widest sense) is unconstitutional if it prevents or limits access to the courts.*

(emphasis added).

[20] CPC is an "existing law" as defined in art. 160(2) FC as follows:

"existing law" means any law in operation in the Federation or any part thereof immediately before Merdeka Day;

(emphasis added).

[21] Article 162(6) and (7) FC provide as follows:

162(6) *Any court* or tribunal *applying the provision of any existing law which has not been modified on or after Merdeka Day under this article or otherwise may apply it with such modifications as may be necessary to bring it into accord with the provisions of this Constitution.*

(7) *In this article "modification" includes amendment, adaptation and repeal.*

(emphasis added).

[22] The court has power under art. 162(6) and (7) FC to "modify" any "existing law" as is necessary to bring the existing law into accord with FC. I rely on the following two judgments:

(i) in *B Surinder Singh Kanda v. The Government of the Federation of Malaya* [1962] 1 LNS 14; [1962] 1 MLJ 169, at 171, an appeal from Federation of Malaya to the Privy Council, Lord Denning decided as follows:

> … It appears to their Lordships that, as soon as the Yang di-Pertuan Agong appointed the Police Service Commission, that Commission gained jurisdiction over all members of the police service and had the power to appoint and dismiss them. It is true that under section 144(1) the functions of the Police Service Commission were "subject to the provisions of any existing law": but this meant only such provisions as were consistent with the Police Service Commission carrying out the duty entrusted to it. *If there was in any respect a conflict between the existing law and the Constitution (such as to impede the functioning of the Police Service Commission in accordance with the Constitution) then the existing law would have to be modified so as to accord with the Constitution. There are elaborate provisions for modification contained in art. 162* which run as follows:
>
> …
>
> *It appears to their Lordships that, in view of the conflict between the existing law (as to the powers of the Commissioner of Police) and the provisions of the Constitution (as to the duties of the Police Service Commission) the Yang di-Pertuan Agong could himself (under art. 162(4)), have made modifications in the existing law within the first two years after Merdeka Day. (The attention of their Lordships was drawn to modifications he had made in the existing law relating to the railway service and the prison service). But the Yang di-Pertuan Agong did not make any modifications in the powers of the Commissioner of Police, and it is too late for him now to do so. In these circumstances, their Lordships think it is necessary for the Court to do so under art. 162(6).* It appears to their Lordships that there cannot, at one and the same time, be two authorities, each of whom has a concurrent power to appoint members of the police service. One or other must be entrusted with the power to appoint. *In a conflict of this kind between the existing law and the Constitution, the Constitution must prevail. The Court must apply the existing law with such modifications as may be necessary to bring it into accord with the Constitution.*
>
> (emphasis added); and

(ii) *Surinder Singh Kanda* has been followed by our Federal Court in *Assa Singh v. Mentri Besar, Johore* [1968] 1 LNS 9; [1969] 2 MLJ 30. Azmi LP held in *Assa Singh*, at p. 33 (MLJ), as follows:

> *Under article 162(1) the Yang di-Pertuan Agong could have made modifications to the [Restricted Residence Enactment] in order to bring its provisions in line with the relevant provisions of the Constitution and it is too late for him to do so now.*

In my view, the Enactment is not unconstitutional merely because it does not have provisions similar to those of article 5 of the Constitution and in my view therefore the provisions of article 5 which are relevant should be read into the provisions of the Enactment.

…

As I said, the problem before us may be solved by reading into the Enactment the relevant provisions of the Constitution.

(emphasis added)

[23] By virtue of art. 162(6) and (7) FC, I have no hesitation to modify s. 260 CPC so as to bring s. 260 CPC into accord with art. 5(1) FC, namely s. 260 CPC cannot deprive the plaintiff's fundamental access to justice by way of the original action.

[24] Fourthly, it must be pointed out that the two Indian cases have been decided before the independence of India and before the introduction of the Indian Constitution (IC). Hence, it is understandable why the two Indian cases have not discussed the effect of fundamental access to justice in relation to the compounding of criminal offences. It is to be noted that art. 21 IC is similar (not identical) to our art. 5(1) FC.

[25] Lastly, the compounding of charge (Ampang Court) solely concerns the first battery. The original action is based on the three batteries. It is clear that the defendant cannot rely on the compounding of charge (Ampang Court) to deny his liability for the second and third batteries.

[26] Premised on the above reasons, especially the plaintiff's fundamental access to justice, I am compelled to reject the defendant's submission that the compounding of charge (Ampang Court) bars the plaintiff from filing the original action based on a tort of battery against the defendant.

Whether Civil Court Or Syariah Court Can Hear Claims For Tort Of Battery

[27] The defendant's learned counsel has submitted that the Selangor Syariah Court (not SC) should have jurisdiction to hear the original action and counterclaim because:

(i) both the plaintiff and defendant are Muslims; and

(ii) the original action and counterclaim concern matters related to the marriage of the plaintiff and defendant which is governed by Syariah law.

[28] I reproduce below the relevant parts of s. 23(1) CJA, ss. 65(1)(b) and 69(e) SCA:

s. 23 CJA **Civil jurisdiction - general**

(1) **Subject to the limitations contained in art. 128 of the Constitution the High Court shall have jurisdiction to try all civil proceedings where**:

A (a) **the cause of action arose**;

(b) **the defendant** or one of several defendants resides or has his place of business;

(c) **the facts on which the proceedings are based exist or are alleged to have occurred**; or

B (d) any land the ownership of which is disputed is situated,

within the local jurisdiction of the Court and notwithstanding anything contained in this section in any case where all parties consent in writing within the local jurisdiction of the other High Court.

C s 65 SCA **Civil jurisdiction of Sessions Courts.**

(1) **Subject to the limitations contained in this Act, a Sessions Court shall have:**

…

D (b) **jurisdiction to try all other actions and suits of a civil nature where the amount in dispute or the value of the subject matter does not exceed one million ringgit; and**

…

Section 69. **Exceptions to jurisdiction.**

E **Sessions Courts shall have no jurisdiction in actions, suits or proceedings of a civil nature:**

…

(e) **to enforce trusts;**

...

F (emphasis added)

[29] SCs are established under s. 3(2)(a) SCA. It is clear that the SC has jurisdiction to decide the original action based on a tort of battery under s. 65(1)(b) SCA because the original action falls within the phrase "all other G actions and suits of a civil nature where the amount in dispute or the value of the subject matter does not exceed one million ringgit" in s. 65(1)(b) SCA.

[30] In addition to s. 65(1)(b) SCA, the following statutory provisions empower the SC to hear the original action based on a tort of battery:

(i) s. 4A MWA provides as follows:

H **Capacity of husband and wife to sue each other for personal injuries**.

4A **A husband or a wife shall be entitled to sue each other in tort for damages in respect of injuries to his or her person, as the case may be, in the like manner as any other two separate individuals**.

I (emphasis added)

It is to be noted that s. 4A MWA is inserted by Parliament by way of Married Women (Amendment) Act 1994 (Act A893); and

(ii) Section 10 DVA states as follows:

Compensation

10(1) **Where a victim of domestic violence suffers personal injuries** or damage to property or financial loss **as a result of the domestic violence, the court hearing a claim for compensation may award such compensation in respect of the injury** or damage or loss **as it deems just and reasonable**.

(2) **The court hearing a claim for such compensation may take into account**:

(a) **the pain and suffering of the victim, and the nature and extent of the physical injury or psychological abuse which include emotional injury suffered**;

(b) **the cost of medical treatment for such injuries**;

(c) any loss of earnings arising therefrom;

(d) the amount or value of the property taken or destroyed or damaged;

(e) necessary and reasonable expenses incurred by or on behalf of the victim when the victim is compelled to separate or be separated from the defendant due to the domestic violence, such as:

(i) lodging expenses to be contributed to a safe place or shelter;

(ii) transport and moving expenses;

(iii) the expenses required in setting up a separate household which, subject to subsection (3), may include amounts representing such housing loan payments or rental payments or part thereof, in respect of the shared residence, or alternative residence, as the case may be, for such period as the court considers just and reasonably necessary.

(3) In considering any necessary and reasonable expenses that may be taken into account under subparagraph (2)(e)(iii), the court may also take into account:

(a) the financial position of the victim as well as that of the defendant;

(b) the relationship that exists between the parties and the reasonableness of requiring the defendant to make or contribute towards such payments;

A

(c) the possibility of other proceedings being taken between the parties and the matter being more appropriately dealt with under the relevant laws relating to the financial provision of spouses or former spouses and other dependants.

(emphasis added)

B

Section 10(1) DVA confers a right on the plaintiff to claim compensation in "court" from her husband (defendant) in respect of "domestic violence" inflicted by the defendant on the plaintiff. Section 2 DVA defines "court" and "domestic violence" as follows:

C

"court" means:

(a) in respect of criminal proceedings involving allegations of domestic violence, the court competent to try the actual offence with which the accused is charged;

(b) **in respect of civil proceedings for compensation under section 10, the court competent to hear such claims in tort**;

D

"domestic violence" means the commission of one or more of the following acts:

(a) wilfully or knowingly placing, or attempting to place, the victim in fear of physical injury;

E

(b) **causing physical injury to the victim by such act which is known or ought to have been known would result in physical injury**;

(c) compelling the victim by force or threat to engage in any conduct or act, sexual or otherwise, from which the victim has a right to abstain;

F

(d) confining or detaining the victim against the victim's will;

(e) causing mischief or destruction or damage to property with intent to cause or knowing that it is likely to cause distress or annoyance to the victim;

G

(ea) **dishonestly misappropriating the victim's property which causes the victim to suffer distress due to financial loss**;

(eb) **threatening the victim with intent to cause the victim to fear for his safety or the safety of his property, to fear for the safety of a third person, or to suffer distress**;

H

(ec) **communicating with the victim, or communicating about the victim to a third person, with intent to insult the modesty of the victim through any means, electronic or otherwise**;

(f) causing psychological abuse which includes emotional injury to the victim;

I

(g) causing the victim to suffer delusions by using any intoxicating substance or any other substance without the victim's consent or if the consent is given, the consent was unlawfully obtained; or

(h) in the case where the victim is a child, causing the victim to suffer delusions by using any intoxicating substance or any other substance,

by a person, whether by himself or through a third party, against:

(i) his or her spouse;

(ii) his or her former spouse;

(iii) a child;

(iv) an incapacitated adult; or

(v) any other member of the family;

(emphasis added)

SC falls within the meaning of "court" in s. 2(b) DVA and the original action concerns "domestic violence" as understood in s. 2(b) DVA (physical injury to the victim by such act which is known or ought to have been known would result in physical injury).

[31] As explained above, I decide that SC (not the Selangor Syariah Court) has jurisdiction to hear the original action.

Whether SC Or HC Has Jurisdiction To Decide Claim For Breach Of Trust

[32] The counterclaim concerns alleged breach of trust. SC's jurisdiction under s. 65(1) SCA is subject to s. 69 SCA. This is clear from the opening words in s. 65(1) SCA (Subject to the limitations contained in this Act). Section 69(e) SCA expressly states that SC "shall have no jurisdiction" to try any action to enforce any trust. Consequently, SC has no jurisdiction to hear the counterclaim.

[33] Although SC has no jurisdiction to try the counterclaim, the HC certainly has jurisdiction to hear the counterclaim pursuant to s. 23(1)(a), (b) and/or (c) CJA. As the HC has jurisdiction to try the defendant's claim concerning the alleged breach of trust, the Syariah Court has no jurisdiction to decide such a claim.

[34] As SC has no jurisdiction to decide the counterclaim, I exercise my discretion to set aside a part of SC's decision (which has dismissed the counterclaim with no order as to costs) and substitute that part with an order that the counterclaim be struck out with no order as to costs. I award no costs to the defendant because the defendant has not raised s. 69(e) SCA at the trial and this appeal. Instead, the defendant has erroneously submitted that the Syariah Court should have jurisdiction to decide the counterclaim.

A **Did SC Err In Admitting Exhibit P24?**

[35] The IO had made a copy of PNB's CCTV recording of the second battery (PNB's copy) in exh. P24. The IO then produced a certificate under s. 90A(2) EA (IO's certificate) which certified that exh. P24 had been produced by a computer in the IO's office (police computer) in the course
B of ordinary use of the police computer.

[36] The defendant's learned counsel had objected to the admissibility of exh. P24 in SC on the ground that s. 90A(2) EA had not been complied with by the plaintiff. According to the defendant's learned counsel, a certificate
C under s. 90A(2) EA should have been certified by an appropriate officer of PNB who was "responsible for the management of the operation" of PNB's computer which had produced PNB's copy.

[37] Section 90A EA provides as follows:

D **Admissibility of documents produced by computers**, and of statements contained therein

s 90A(1) *In any* criminal or *civil proceeding a document produced by a computer*, or a statement contained in such document, *shall be admissible as evidence of any fact stated therein if the document was produced by the computer in the course of its ordinary use, whether or not the person tendering the same is the maker of such*
E *document or statement*.

(2) *For the purposes of this section it may be proved that a document was produced by a computer in the course of its ordinary use by tendering to the court a certificate signed by a person who either before or after the production of the document by the computer is responsible for the management of the operation of that computer, or for*
F *the conduct of the activities for which that computer was used.*

(3)(a) It shall be sufficient, in a certificate given under subsection (2), for a matter to be stated to the best of the knowledge and belief of the person stating it.

(b) *A certificate given under subsection (2) shall be admissible in evidence as*
G *prima facie proof of all matters stated in it without proof of signature of the person who gave the certificate.*

(4) *Where a certificate is given under subsection (2), it shall be presumed that the computer referred to in the certificate was in good working order and was operating properly in all respects throughout the material part of the period during which the*
H *document was produced.*

(5) A document shall be deemed to have been produced by a computer whether it was produced by it directly or by means of any appropriate equipment, and whether or not there was any direct or indirect human intervention.

I (6) A document produced by a computer, or a statement contained in such document, shall be admissible in evidence whether or not it was produced by the computer after the commencement of the criminal or civil

proceeding or after the commencement of any investigation or inquiry in relation to the criminal or civil proceeding or such investigation or inquiry, and any document so produced by a computer shall be deemed to be produced by the computer in the course of its ordinary use.

(7) Notwithstanding anything contained in this section, a document produced by a computer, or a statement contained in such document, shall not be admissible in evidence in any criminal proceeding, where it is given in evidence by or on behalf of the person who is charged with an offence in such proceeding the person so charged with the offence being a person who was:

(a) responsible for the management of the operation of that computer or for the conduct of the activities for which that computer was used; or

(b) in any manner or to any extent involved, directly or indirectly, in the production of the document by the computer.

(emphasis added)

[38] I am of the view that the learned SCJ did not err in admitting exh. P24 as evidence in this case. This decision is premised on the following evidence and reasons:

(i) Exhibit P24 is a "document" within the meaning of s. 3 EA. The term "document" is widely defined in s. 3 EA as follows:

"document" means any matter expressed, described, or howsoever represented, upon any substance, material, thing or article, including any matter embodied in a disc, tape, film, soundtrack **or other device whatsoever, by means of**:

(a) letters, figures, marks, symbols, signals, signs, or other forms of expression, description, or representation whatsoever;

(b) **any visual recording (whether of still or moving images)**;

(c) any sound recording, or any electronic, magnetic, mechanical or other recording whatsoever and howsoever made, or any sounds, electronic impulses, or other data whatsoever;

(d) **recording, or transmission, over a distance of any matter by any, or any combination, of the means mentioned in paragraph (a), (b) or (c)**,

or by more than one of the means mentioned in paragraphs (a), (b), (c) and (d), intended to be used or which may be used for the purpose of expressing, describing, or howsoever representing, that matter;

(emphasis added);

(ii) Exhibit P24 (produced from the police computer) should be distinguished from PNB's copy (produced from PNB's computer). Exhibit P24 was "primary evidence" produced from the police computer within the meaning of explanation 3 to s. 62 EA. Section 62 EA states as follows:

> Primary evidence.
>
> 62 Primary evidence means the document itself produced for the inspection of the court.
>
> …
>
> Explanation 3 - A document produced by a computer is primary evidence.
>
> (emphasis added)

It is to be noted that when Parliament introduced, among others, s. 90A EA [through Evidence (Amendment) Act 1993 (Act A851)], Explanation 3 to s. 62 EA has also been inserted by way of Act A851 to provide for "primary evidence" produced by computers;

(iii) as stated in the IO's certificate, the IO was "responsible for the management of the operation" of the police computer which produced exh. P24. The IO had been called as a witness for the plaintiff's case in support of the original action. During the IO's cross-examination, the defendant's learned counsel did not put to the IO that the IO was not responsible for the management of the operation of the police computer (as certified in the IO's certificate). By not challenging the IO's responsibility for the management of the operation of the police computer (as certified in the IO's certificate), the defendant is deemed to have admitted such a fact - please see the judgment of Raja Azlan Shah CJ (Malaya) (as His Majesty then was) in the Federal Court case of *Wong Swee Chin v. PP* [1980] 1 LNS 138; [1981] 1 MLJ 212, at 213. Accordingly, as the person responsible for the management of the operation of the police computer (which produced exh. P24), the IO could issue the IO's certificate under s. 90A(2) EA;

(iv) the following provisions in s. 90A EA apply to the IO's certificate:

(a) according to s. 90A(3)(b) EA, the IO's certificate "shall be admissible in evidence as *prima facie* proof of all matters stated in it"; and

(b) based on s. 90A(4) EA, "it shall be presumed' that the police computer "was in good working order and was operating properly in all respects throughout the material part of the period during which the (exh. P24) was produced"; and

(v) in the Federal Court case of *PP v. Azilah Hadri & Anor* [2015] 1 CLJ 579; [2015] 1 MLJ 617, at [60]-[61], Suriyadi Halim Omar FCJ decided as follows:

> [60] **Section 90A(2) [EA] demands certain conditions to be complied with, to enable the documents produced by a computer and of statements contained therein, to be admissible**.
>
> ...
>
> [61] In ***Gnanasegaran a/l Pararajasingam v. Public Prosecutor*** [1997] 3 MLJ 1, **the Court of Appeal held as follows**:
>
> *Section 90A [EA] makes computerised records made in the course of its ordinary use admissible if the following is proven, ie that: (i) the documents were produced by a computer; and (ii) the computer records are produced in the course of its ordinary use. Proof can either be by a certificate signed by someone solely in charge of the computer which produced the printout as required by s. 90A(2), or by an officer of the bank. ...*
>
> *That decision was followed by the Federal Court in Ahmad Najib bin Aris v. Public Prosecutor* [2009] 2 MLJ 613.
>
> (emphasis added)

Based on *Azilah bin Hadri*, the IO's certificate complied with s. 90A(2) EA. Hence, exh. P24 was rightly admitted by SC under s. 90A(1) EA.

Elements Of Tort Of Battery

[39] In *Daning Laja v. KK Hj Tuaran Majid* [1993] 1 CLJ 44, at 47, Ian HC Chin JC (as he then was) has decided as follows in HC:

> **The plaintiff's claim is based on the tort of** assault and **battery which are defined in *Halsbury's Law of England***, 4th Edn, paras 1310 and 1311 as follows:
>
> 1310. Assault is an intentional offer of force or violence to the person of another ...
>
> 1311. **A battery is an act of the defendant which directly and either intentionally or negligently causes some physical contact with the person of the plaintiff without the plaintiff's consent**. The term "assault" is commonly used to include battery.
>
> (emphasis added).

[40] Based on the above edition of "*Halsbury's Law of England*", a plaintiff alleging battery by a defendant has to prove the following three elements of the tort (three elements):

(i) the defendant has committed an act (act) which directly causes physical contact with the plaintiff;

(ii) the act is done without the plaintiff's consent; and

(iii) the act is done intentionally or negligently by the defendant.

A **Whether SC Had Made "Plain Error Of Fact" Regarding Three Batteries**

[41] I am satisfied that the SC has not erred in fact by deciding that the three elements regarding the three batteries have been proven by the plaintiff in the original action. I rely on the following evidence and reasons:

B (i) the three elements regarding the three batteries have been proven by the plaintiff's testimony (plaintiff's testimony); and

(ii) the plaintiff's testimony is supported by the following evidence:

(a) the expert opinion of Dr Chan Kin Yoong (Dr Chan) who had examined and treated the plaintiff regarding the plaintiff's injuries
C suffered as a result of the three batteries (plaintiff's injuries). Dr Chan's expert testimony is admissible under s. 45(1) EA and is supported by:

(1) Dr Chan's medical report regarding the plaintiff's injuries; and

D (2) the plaintiff's medical appointment card which showed the plaintiff's visits to Dr Chan.

It is to be noted that Dr Chan is an independent expert witness in this case. Hence, great weight should be attached to Dr Chan's expert views regarding the plaintiff's injuries;

E

(b) three radiology reports regarding x-ray examinations of the plaintiff which showed fractures of the plaintiff's ribs as a result of the three batteries;

(c) photographs regarding the plaintiff's injuries;

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(d) the plaintiff was admitted into Taman Desa Medical Centre for two days; and

(e) the plaintiff's police reports made against the defendant regarding the three batteries.

G **[42]** It is settled law that an appellate court should not intervene regarding a trial court's findings of fact, especially findings regarding credibility of witnesses, unless there is a "plain error of fact" by the trial court which has caused an injustice and which warrants appellate intervention - please see the judgment of Steve Shim CJ (Sabah & Sarawak) in the Federal Court case of
H *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309, at 317-321. I am not satisfied that the learned SCJ has made a "plain error of fact" regarding the defendant's liability to the plaintiff in respect of the three batteries.

[43] As explained in the above paras. [41] and [42], the defendant's appeal
I against liability for the three batteries in the original action is hereby dismissed.

Whether There Should Be Appellate Intervention Regarding Damages Award

[44] Firstly, an appellate court generally does not intervene regarding a trial court's award of compensatory damages unless the award of damages is "so extremely high" which justifies appellate intervention - please see the judgment of Azmi CJ (Malaya) (as he then was) in the Federal Court in *Topaiwah v. Salleh* [1968] 1 LNS 161; [1968] 1 MLJ 284, at 285.

[45] I have no hesitation to affirm SC's award of RM30,000 as general damages for the plaintiff's injuries (general damages award) for the following reasons:

(i) in making the general damages award, in accordance with s. 10(2)(a) DVA, the learned SCJ had considered the "pain and suffering of the victim, and the nature and extent of the physical injury";

(ii) the learned SCJ has given sufficient reasons in his grounds of judgment (GOJ) for the general damages award;

(iii) the learned SCJ has not committed any error of law in the GOJ regarding the general damages award;

(iv) in view of the nature and extent of the plaintiff's injuries (as testified by Dr Chan), I find that the general damages award is "just and reasonable" in accordance with s. 10(1) DVA; and

(v) the general damages award is not "so extremely high" to warrant appellate intervention in this case.

[46] Regarding the court's discretionary power to award aggravated damages, I rely on the Court of Appeal's judgment in *Sambaga Valli K R Ponnusamy v. Datuk Bandar Kuala Lumpur & Ors And Another Appeal* [2017] 1 LNS 500; [2018] 1 MLJ 784. Zawawi Salleh JCA (as he then was) has decided in *Sambaga Valli*, at [32], that the court may grant aggravated damages if the injury to a plaintiff has been "caused or exacerbated by the exceptional conduct of the defendant".

[47] The SC has awarded RM50,000 as aggravated damages to be paid by the defendant to the plaintiff (aggravated damages award). I am of the view that there should not be any appellate intervention regarding the aggravated damages award because the following conduct of the defendant has clearly justified such an award:

(i) a matrimonial home is a place where spouses are loved and kept safe. However, the first battery was committed at home;

(ii) the first battery was committed in the presence of the children, maid and chauffeur. In other words, the defendant had humiliated the plaintiff before the children, maid and chauffeur;

A (iii) after the defendant had caused grievous hurt to the plaintiff at home, the defendant forced the plaintiff (in her severely injured state) to go to Alliance Bank, PNB and the office of the defendant's solicitor. In such a manner, the defendant had publicly disgraced the plaintiff; and

(iv) the second battery was committed in PNB's office in the presence of
B PNB's employees and investors.

[48] In view of the reasons stated, I dismiss the defendant's appeal against the damages award.

Court's Decision

C

[49] Premised on the above evidence and reasons, the following order is made:

(i) the defendant's appeal against SC's decision regarding the original action, is dismissed with costs; and

D (ii) the defendant's appeal concerning SC's decision in respect of the counterclaim is allowed whereby the counterclaim is struck out with no order as to costs.

[50] Domestic violence cannot be justified in any circumstance and the court should ensure that victims of domestic violence are compensated in a
E "just and reasonable" manner as provided in s. 10(1) DVA.

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